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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1270

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, *et al.*,
Petitioners,

VS.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Respondents believe that petitioners' statement of the case omits information which is essential to a full understanding of the issues presented for review, and therefore provide the following supplementary statement.

This case involves the interpretation of a single term —"pollutant"—in the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 86 Stat. 816, 33

U.S.C. § 1251 *et seq.* (Supp. II, 1972). The statutory definition of "pollutant" explicitly includes "radioactive materials" without qualification or limitation. 33 U.S.C. § 1362(6) (Supp. II, 1972). The FWPCA further defines the term "pollution" to mean "the man-made or man-induced alteration . . . of the radiological integrity of water." 33 U.S.C. § 1362(19) (Supp. II, 1972), and explicitly regulates radioactive materials subject to the Atomic Energy Act. (AEA).[1] *See* 33 U.S.C. § 1311(f) (Supp. II, 1972).

These provisions were the product of a careful and intensive congressional effort to draft a truly comprehensive statute governing all aspects of water pollution. The Senate Subcommittee on Air and Water Pollution of the Committee of Public Works held hearings and deliberated more than two years before drafting and reporting an original bill, S.2770, on October 28, 1971.

[1]68 Stat. 919, 42 U.S.C. § 2011 *et seq.* (1970). Pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. § 5801 *et seq.* (Supp. Feb., 1975), the Nuclear Regulatory Commission (NRC) succeeded to the regulatory functions of the Atomic Energy Commission (AEC); the new Energy Research and Development Administration (ERDA) assumed responsibility for operating the government's nuclear facilities. The Energy Reorganization Act provides that NRC's licensing authority over commercial nuclear facilities and ERDA's operational authority over government nuclear facilities shall continue to be subject to the provisions of the Atomic Energy Act. 42 U.S.C.A. §§ 5841(f), 5874, 5871(a) (Supp. Feb., 1975). Therefore, to refer to radioactive materials which are defined by the Atomic Energy Act as source, by-product and special nuclear material and which are subject to NRC's jurisdiction in connection with commercial nuclear operations and subject to ERDA's authority in connection with the government's operations, this brief will use the term "AEA-regulated" radioactive materials. This term is appropriate since both NRC and ERDA are governed by the statutory standards set out in the Atomic Energy Act.

2 Leg. Hist. 1415.[2] The full Senate approved the bill on November 2, 1971.

The House Committee on Public Works also conducted extensive hearings on water pollution legislation, and on March 11, 1972 reported a new bill, H.R. 11896, based on the Senate-passed legislation. 1 Leg. Hist. 753. The full House adopted the bill on March 29, 1972.

To resolve the differences in the Senate and House versions of the bill, a Conference Committee was convened and held 39 meetings during a three-month period. The Conference bill was passed overwhelmingly by both the House and Senate, and the bill became law on October 18, 1972, when Congress overrode the veto of President Nixon.[3]

As we fully discuss later, the legislative history establishes that both the Senate bill and the Conference bill —which was ultimately enacted into law—intended to regulate all "radioactive materials" including those subject to the Atomic Energy Act. Although some members of the House supported an exemption from the FWPCA for AEA-regulated radioactive materials, they could not attract sufficient support even to write this exclusion into the House bill.

[2]Leg. Hist. refers to the Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 Together with a Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93rd Cong., 1st Sess. (1973).

[3]The FWPCA passed the House by a vote of 366-11, 1 Leg. Hist. 276, and the Senate by 74-0. 1 Leg. Hist. 222. The House overrode the President's veto by a vote of 247-23, 1 Leg. Hist. 109, and the Senate voted 52-12 to override. 1 Leg. Hist. 135.

Under the new law, the Administrator of the Environmental Protection Agency (EPA) was charged with the responsibility of administering the FWPCA, 33 U.S.C. § 1251(d) (Supp. II, 1972), including *inter alia*, implementation of the National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. § 1342 (Supp. II, 1972). The NPDES established a permit system as the basic mechanism in the FWPCA for reducing and eliminating pollution by enforcing effluent limitations and water quality standards applicable to the discharge of pollutants into the navigable waters.

On April 9, 1973, EPA published a public notice announcing its intent to issue a NPDES permit to the Public Service Company of Colorado for its Fort St. Vrain Nuclear Generating Station. The proposed St. Vrain permit, Appendix, at 21, included limitations on the discharge of "radioactive materials," specifically providing for the "control of liquid radioactive waste," Appendix, at 29, and "radiation monitoring." Appendix, at 34.

However, before the St. Vrain permit could be issued, EPA published a new public notice on July 6, 1973, which did not contain any limitations on the discharge of liquid radioactive waste from the Fort St. Vrain facility. Appendix, at 39. This public about-face in the St. Vrain proceeding—reflected in the record in the present case—was apparently due to the adoption of regulations to implement the NPDES. 38 Fed. Reg. 13528 (May 22, 1973). In § 125.1(x) of these regulations the Administrator—ostensibly on the basis of

"legislative history"—excluded from regulation under the FWPCA all radioactive materials subject to the Atomic Energy Act. 38 Fed. Reg. 13529-30.[4]

The creation of this exemption has had two effects. First, it eliminated from regulation under the FWPCA the vast majority of "radioactive materials" discharged into water, rendering unenforceable the Act's goal of protecting the "radiological integrity of water." Second, it has left the authority to control radioactive discharges split between the Energy Research and Development Administration (ERDA) which operates government nuclear facilities, and the Nuclear Regulatory Commission (NRC) which licenses commercial nuclear facilities.[5] In addition, NRC's activities in setting effluent limitations must, somewhat awkwardly, be coordinated with EPA's authority to set generally applicable environmental radiation protection standards. *See, e.g.*, 40 Fed. Reg. 23419 (May 29, 1975).

The decision to limit the jurisdiction of the FWPCA was apparently the result of an inter-agency struggle

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[4]The exclusion was supported by the following comment which was appended to § 125.1(x):

> The legislative history of the [FWPCA] reflects that the term 'radioactive materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes. (H.R. Rep. 92-911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong. Rec. 17401, daily ed., November 2, 1971; 118 Cong. Rec. 9115, daily ed., October 4, 1972.)

[5]See note 1, *supra*.

between EPA and the Atomic Energy Commission (AEC),[6]—a struggle which was acknowledged by two inter-agency memoranda of understanding later in 1973. 38 Fed. Reg. 24936 (Sept. 11, 1973); 38 Fed. Reg. 32965 (Nov. 29, 1973); *see also* 40 Fed. Reg. 19439 n. 3 (May 5, 1975). Indeed, the conflict between the AEC and the EPA over the extent of EPA's authority over individual types of nuclear facilities (which extended beyond EPA's authority under the FWPCA) was resolved ultimately by President Nixon in favor of the AEC. *N.Y. Times,* Dec. 11, 1973, at 1, col. 4; 4 *Environment Reporter* 1370 (1973).[7] In terms of the FWPCA, EPA itself has acknowledged that its decision to exclude radioactive materials from coverage under the FWPCA was "made at AEC's request . . . *in spite of the rather clear mandate of FWPCA for radioactive materials.*"[8]

Furthermore, EPA decided not to request the Solicitor General to petition this Court for review of the

[6]Throughout this brief, reference is made to the Nuclear Regulatory Commission (NRC) and to the Energy Research and Development Administration (ERDA) which succeeded to the Atomic Energy Commission's (AEC) functions. *See* note 1, *supra.* Specific references to the AEC are used when the context so requires.

[7]*See* Memorandum from Roy Ash, President's Director of Management and Budget, to Administrator Train and Chairman Ray (Dec. 7, 1973), attached to Brief Amicus Curiae on behalf of Arkansas *et al.*, filed in the Tenth Circuit.

[8]This statement appears in EPA's discussion of its reasons for issuing general radiation standards for the uranium fuel cycle:

> Issuance of these standards also would assist in the defense of a state or environmenalist suit against the Administrator challenging EPA's decision to exclude radioactive materials from the permit program under the FWPCA. ***This decision was made at AEC's request to avoid duplication of ongoing AEC plant licensing activities, in spite of the rather clear mandate of FWPCA for radioactive materials.*** It was made based on EPA's plans to issue these standards for the uranium fuel cycle under authority separate from the FWPCA.

U.S. Environmental Protection Agency, "Draft Statement of Considerations—Environmental Radiation Standards for the Uranium Fuel Cycle" 41 (September, 1973) (emphasis added). Distributed to interested persons at the time it was issued, the "Statement of Considerations" was lodged with the Tenth Circuit in support of the Brief Amicus Curiae on Behalf of Arkansas, *et al.*

Tenth Circuit's decision. Review was apparently sought only at the request of NRC. 16 *Nucleonics Week,* Jan. 16, 1975, at 9, and Jan. 23, 1975, at 5. Thus, in this case the Court is asked to create a significant exception to this detailed statute which is sought not by the agency charged with the enforcement of the FWPCA, but by an agency seeking to protect its own jurisdiction.

Respondents will demonstrate in this brief the validity of the Tenth Circuit's conclusion that this exception is consistent neither with the unambiguous language of the FWPCA, nor with the Act's legislative history. *See Colorado Public Interest Research Group v. Train,* 507 F.2d 743 (10th Cir. 1974) (McWilliams, J.).

SUMMARY OF ARGUMENT

This Court is asked to decide whether a major—and increasingly important—type of pollution, namely radioactive materials, is subject to the FWPCA's comprehensive regulatory program designed to restore and maintain our nation's vital water resources. The FWPCA prohibits the "discharge" of any "pollutant" from any "point source" into the "navigable waters"

except in compliance with specified statutory provisions. The FWPCA defines the term "pollutant" to include "radioactive materials" without limitation or exception. 33 U.S.C. § 1362(6) (Supp. II, 1972). The natural meaning of the phrase "radioactive materials", in both its popular and technical sense, refers generically to all radioactive materials.

This unambiguous statutory language deserves particular weight in the present case since Congress gave the FWPCA "microscopic scrutiny", and Senator Muskie flatly asserted Congress tried "to write into law as clearly as possible the intent of Congress," 1 Leg. Hist. 164. In addition, the FWPCA's broad purpose to control water pollution, the comprehensive nature of its regulatory scheme, and explicit congressional statements as well as relevant canons of statutory construction require this Court to give a broad interpretation to key provisions of the FWPCA, such as the definition of "pollutant."

Yet petitioners seek a broad exemption that would remove from the FWPCA AEA-regulated radioactive materials which represent the vast majority of radioactive materials discharged into water by point sources, thereby reducing the FWPCA's reference to these materials to an empty gesture. Elsewhere, when Congress has sought to create an exception of this magnitude, it has done so in statutory language. In addition, the exemption sought by petitioners would create by implication a major exception despite the fact that Congress wrote other exceptions into the definition of "pollutant." When a statute contains

specific exceptions, no other exceptions are to be read into the statute.

Further, other provisions of the FWPCA clearly apply to AEA-regulated radioactive materials. Congress defined "pollution" to mean the "man-made or man-induced . . . alteration of the radiological integrity of water." 33 U.S.C. § 1362(19) (Supp. II, 1972). In addition, the FWPCA explicitly prohibits the discharge of highly concentrated forms of radioactive materials subject to AEA regulation. 33 U.S.C. § 1311(f) (Supp. II, 1972). Finally, the FWPCA specifically requires EPA to establish "national standards of performance" to reduce pollution from newly constructed nuclear "steam electric power plants." 33 U.S.C. § 1316(b)(1)(A) (Supp. II, 1972).

In light of the FWPCA's unequivocal language, resort to legislative history is inappropriate in the instant case, particularly since petitioners seek to use legislative history to create ambiguity, not to solve it. Even so, an objective reading of the full legislative record establishes Congress' intent to regulate all radioactive materials under the FWPCA.

The Senate Committee wrote an extremely broad definition of pollutant intended to require an NPDES permit for the addition of "any" material into navigable waters, and made explicit reference in its Report to the regulation of AEA-regulated nuclear fuels processing plants. 2 Leg. Hist. 1477. Senator Muskie himself indicated on the floor of the Senate that the Senate Committee believed the Senate bill applied to AEA-regulated radioactive materials. 2 Leg. Hist. 1266. In

the House, supporters of the exemption were unable to write a specific exemption into the House bill. In addition, despite the language in the House Report, the House debate reveals considerable confusion over whether the FWPCA applied to AEA-regulated materials. *See, e.g.,* 1 Leg. Hist. 746. And the debate on a proposed amendment indicates that most Representatives assumed that the phrase "radioactive materials" included AEA-regulated radioactive materials. 1 Leg. Hist. 542-57.

The Conference Committee's bill substituted a new definition of pollutant which revised in several respects both the House and Senate definitions of "pollutant," even deleting two House-passed exceptions. Having given the definition careful scrutiny, the Conference Committee included the term "radioactive materials" without exception or qualification and made no reference to any exemption in the Conference Report. 1 Leg. Hist. 326-27. During the Senate debate on the Conference's bill, numerous references were made to the AEC as an example of an agency whose authority in setting effluent limitations would yield under the FWPCA to EPA. 1 Leg. Hist. 183, 198, 202, 205. Thus, the Conference Committee adopted a comprehensive water pollution control statute intended to cover radioactive materials in the same fashion as any other waste material, and the Senate adopted the Conference bill without even a hint of an exemption for AEA-regulated materials.

Regulation of all radioactive materials under the FWPCA ends, not creates, redundant regulation.

It will permit EPA to utilize its extensive radiation protection expertise to formulate effluent limitations and eliminate current overlapping authority among EPA, ERDA, and NRC.

ARGUMENT

I. THE COMPREHENSIVE FWPCA EXPLICITLY REGULATES ALL RADIOACTIVE MATERIALS DISCHARGED INTO WATER AND ANY OTHER INTERPRETATION WOULD MAKE THE ACT INTERNALLY INCONSISTENT.

The present case draws into question the breadth of coverage of the FWPCA. The materials which the FWPCA regulates are defined as "pollutants," and the Act explicitly defines pollutant to include "radioactive materials." However, the government—petitioner in this Court—argues that an exception should be read into this statutory term to exempt radioactive materials subject to the Atomic Energy Act.

Thus, the Court is asked to decide whether a major —and increasingly important—type of pollution, namely radioactive materials, is subject to the FWPCA's comprehensive and carefully drafted control system designed to reduce water pollution. Petitioners argue—with no support in the statute or in the legislative history considered in context—that the FWPCA was intended to be comprehensive in all respects except one—radioactive materials—and that the general obligation imposed on ERDA and NRC to protect the public health and safety (by a statute

enacted more than 20 years ago to promote nuclear energy) should prevail over the detailed provisions and standards set out in the FWPCA to control water pollution.

The interpretation of the provisions of the FWPCA, and particularly the Act's definition of pollutant, must begin with an analysis of (1) the Act's purposes and (2) the actual language of the statute—analyses notably absent from the petitioners' presentation of the case.

A. The FWPCA Creates A Comprehensive, Detailed Regulatory Mechanism To Control Water Pollution.

As this Court has repeatedly emphasized:

> [It is] fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and in fulfilling our responsibility in interpreting legislation 'we must not be guided by a single sentence, but [should] look to the provisions of the whole law and to its object and policy.'
>
> *Richards v. United States,* 369 U.S. 1, 11 (1962).

When the success of a statute's policy depends in large measure on the interpretation given the provision in question, this canon of interpretation assumes particular importance. And in this case, the definition of the term "pollutant" lies at the very heart of the regulatory mechanism that the FWPCA creates.

The FWPCA establishes a unified regulatory system designed to restore and maintain our nation's vital

water resources.[9] 33 U.S.C. § 1251(a) (Supp. II, 1972); *See Train v. City of New York,* 420 U.S. 35, 37 (1975) (White, J.); *United States v. Ashland Oil and Transportation Company,* 504 F.2d 1317, 1324-25 (6th Cir. 1974); *Scenic Hudson Preservation Conference v. Callaway,* 370 F. Supp. 162, 169-70 (S.D.N.Y. 1973), *aff'd per curiam,* 499 F.2d 127 (2nd Cir. 1974); *Natural Resources Defense Council v. Train,* ..... F. Supp. ....., 7 E.R.C. 1881 (D.D.C. 1975); *Natural Resources Defense Council v. Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975); *United States v. Holland,* 373 F. Supp. 665, 668 (M.D. Fla. 1974).

This Court recently recognized that the FWPCA "was intended . . . to achieve an early solution of what

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[9]The FWPCA's Declaration of Goals and Policy states that:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national goal that the discharge of pollutants into the navigable water be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
>
> (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
>
> (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and
>
> (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.
>
> 33 U.S.C. § 1251(a) (Supp. II, 1972)

was deemed an urgent problem." *Train v. City of New York, supra,* at 45. Indeed, the degree of congressional concern over water pollution and the all-encompassing scope of the FWPCA's regulatory scheme was repeatedly stated in Congress and is consistently and repeatedly reflected in the Act's provisions. Senator Eagleton, a member of the Conference Committee, stated during the Senate consideration of the Conference Report:

> If one word best describes the Federal Water Pollution Control Act Amendments of 1972, it is the word "comprehensive". It is comprehensive in its coverage of water pollution sources; it provides a broad-gaged but tightly knit programmatic attack on water pollution. . . .
>
> 1 Leg. Hist. 218.

Representative Dorn, one of the co-authors of the FWPCA, during the House debate on overriding the President's veto of the Act commented: "[T]he clean water bill now before Congress is the most far-reaching environmental improvement bill in history. This is bipartisan legislation, and it passed both bodies by overwhelming votes." 1 Leg. Hist. 109. And as Senator Muskie, the FWPCA's primary author, stated during the Senate's consideration of the Conference Report:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us. We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.
>
> 1 Leg. Hist. 161-62.

To achieve the FWPCA's primary objective of the elimination of water pollution by 1985, the Act establishes a specific and elaborate regulatory scheme. This scheme involved a shift in the government's pollution control efforts away from merely setting ambient water quality standards to the mechanism of setting specific effluent limits. In enacting this shift, Congress sought to achieve two major objectives. First, direct limits on the release of pollutants would provide more effective control. But secondly—and perhaps more importantly—the process of setting effluent limits would provide the basis for the government to require polluters to develop the technology to control the release of pollution. *See Natural Resources Defense Council v. Train,* 510 F.2d 692 (D.C. Cir. 1974).

To stimulate pollution control technology, the FWPCA created a phased approach, setting deadlines far in advance, for achieving gradually more stringent control levels.

> Your committee has placed before you a tough bill. This body and this Nation would not have it be otherwise. Our legislation contains an important principle of psychology: Men seldom draw the best from themselves unless pressed by circumstances and deadlines. This bill contains deadlines and it imposes rather tough standards on industry, municipalities, and all other sources of pollution.

> Only under such conditions are we likely to press the technological threshold of invention into new and imaginative developments that will allow us to meet the objectives stated in our bill.
>
> 2 Leg. Hist. 1278.

Thus, the FWPCA requires that all direct dischargers of pollutants must apply "the best practicable" technology to control pollution by 1977, 33 U.S.C. § 1311(b)(1)(A) (Supp. II, 1972), and must apply "the best available" technology by 1983, 33 U.S.C. § 1311(b)(2)(A) (Supp. II, 1972). In addition, the Act requires that all newly constructed direct sources of water pollution incorporate the "best available" control technology and that the EPA administrator specify in detail the precise limitations that each category must meet. 33 U.S.C. § 1316 (Supp. II, 1972).

The effectiveness of the FWPCA's plan to require the phasing in of increasingly effective pollution technology and thereby to restore the quality of the nation's waters obviously depends upon the breadth of the Act's coverage. To the extent polluting materials, or polluters, or waterways, or methods of release are not regulated by the FWPCA's provisions, the Act's purpose to reduce and eventually to eliminate water pollution will be frustrated.

Plainly, the purposes and policies behind the FWPCA call for the Act to be broadly construed. Moreover, Congress intended that the Act be construed to extend, not to restrict, its reach. In a discussion of the "significant provisions" of the Conference bill, Senator Muskie declared:

> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly.
>
> 1 Leg. Hist. 178.

This Court has continually reaffirmed that remedial legislation, such as the FWPCA, is to be liberally construed consistent with the statute's overriding purpose. *Stewart v. Kahn,* 78 U.S. (11 Wall.) 493, 504 (1870); *Logan v. Davis,* 233 U.S. 613, 628 (1914); *Peyton v. Rowe,* 391 U.S. 54, 65 (1968); *United States v. Bacto-Unidisk,* 394 U.S. 784, 798 (1969). In particular, legislation designed to abate water pollution should be liberally construed. *United States v. Standard Oil Co.,* 384 U.S. 224, 226 (1966) (Douglas, J.); *United States v. Republic Steel Corp.,* 362 U.S. 482, 491 (1960) (Douglas, J.). The reason such legislation receives a liberal construction was well put by Mr. Justice Holmes: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York,* 283 U.S. 336, 342 (1931).

If any provisions of the FWPCA demand to receive this broad construction, it is the sections that define its terms—for these determine the Act's scope. Thus, the Act enforces EPA's effluent limitations by providing that the "discharge" of any "pollutant" from any "point source" into "navigable waters" is unlawful except in compliance with the specified statutory provisions. 33 U.S.C. § 1311(a) (Supp. II, 1972). The scope of the FWPCA's coverage is completely dependent on the definitions of these critical terms. Repre-

sentative Blatnik, a member of the House Public Works Committee and of the Conference Committee, made the point succinctly:

> The total utility of the bill is reflected in the definitions of the terms pollutant, pollution, point source, discharge, and toxic pollutant. To revise any of these definitions is to upset the common threat [sic] of the bill. If there is a part of this bill that can be labeled 'most important,' it is these definitions. To revise them in a way to limit their coverage is to severely detcact [sic] from the effectiveness of the bill.
>
> 1 Leg. Hist. 356.

In summary, respondents believe that the purposes of the FWPCA and the intent of Congress, as well as applicable canons of interpretation, require this Court to give as broad a construction to the term "pollutant" as the congressional language will reasonably sustain. Certainly this Court should be reluctant to interpret the term pollutant "in a way to limit [its] coverage" by exempting AEA-regulated radioactive materials from the FWPCA and thereby "severely detract from the effectiveness" of the Act.

B. Congress' Detailed Consideration Of The FWPCA Suggests That Primary Importance Should Attach To The Statute's Language.

It is, of course, a basic canon of statutory construction that the language that Congress writes into law, particularly in the absence of any ambiguity, should determine how a statute is intepreted.

> In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in so doing . . . first reference is of course to the literal meaning of the words employed.
>
> *Flora v. United States,* 357 U.S. 63, 65 (1958).

Beyond this general rule, the history of the FWPCA itself should convince the Court in interpreting the Act to give primary weight to the language Congress chose to employ. The final bill which was enacted into law was the product of a three-month Conference between the Senate and the House. During the 39 meetings of the Conference Committee—"often starting early in the morning and running late into the evening"[10]—the bill received "microscopic scrutiny," which Senator Randolph declared he had "seldom seen a bill of any nature receive." 1 Leg. Hist. 185. Moreover, according to Senator Muskie, the Conference Committee

> tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to try to write into law as clearly as possible the intent of Congress.
>
> 1 Leg. Hist. 164.

In light of the unusually careful attention given the bill by Congress and the stated effort to write its intent into law, this Court should be slow to depart from the plain meaning of the statutory language. This caution applies particularly strongly in the case

[10] 1 Leg. Hist. 161. Senator Muskie went on to declare:
> I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. *Id.*

of provisions that the framers are known to have regarded as crucial, such as the definition of the key term pollutant involved in the instant case.

C. The Act Explicitly Defines Pollutant To Include All Radioactive Materials.

The FWPCA defines what materials are pollutants and what materials are not pollutants:

> *The term 'pollutant' means* dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials,* heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, muncipal, and agricultural waste discharged into water. *This term does not mean* (A) 'sewage from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
>
> 33 U.S.C. § 1362(6) (Supp. II, 1972) (emphasis added).

Since only the discharge of a "pollutant" will trigger the Act's regulatory mechanism, the definition of pollutant is central to the FWPCA.

Not surprisingly, the definition is most noteworthy for its breadth. Indeed, the terms employed are so

broad and all-inclusive that most pollutants would seem likely to be covered by two or three of the itemized categories. Radioactive releases from nuclear power plants, for example, would arguably appear to qualify as both "industrial wastes" and "chemical wastes." But even more precisely, the definition explicitly names "radioactive materials" without exception or limitation as being subject to the FWPCA.

In analyzing the specific phrase "radioactive materials," there can be little doubt that its natural meaning includes all radioactive materials, including those regulated under the Atomic Energy Act. In both popular and technical usage, the phrase always refers generically to *all* such materials. Thus, radioactive is defined as "pertaining to, exhibiting, or caused by radioactivity." *Random House Dictionary of the English Language* 1185 (unabridged ed. 1967). Material is the "substance or substances of which a thing is made" or "any constituent element of a thing." *Id.*, at 884. *Accord, Webster's Third New International Dictionary* 1872, 1392 (unabridged ed. 1969).

In a technical sense, the Nuclear Regulatory Commission's "Standards for Protection Against Radiation," 10 C.F.R. Part 20 (1975), define "radioactive material" to mean "any such material *whether or not subject to licensing control by the Commission.*" 10 C.F.R. § 20.3(13) (1975) (emphasis added). EPA has defined the term in its proposed "Environmental Radiation Protection Standards for Nuclear Power Operations," as "any material which emits radiation." 40 Fed. Reg. 23419, 23423 (May 29, 1975). And in the

glossary of nuclear terms published by the Atomic Energy Commission, the term "radioactive materials" is used throughout as a broad, generic term.[11]

Moreover, it is important to note the broad scope of the exception that petitioners seek. Radioactive materials that are regulated under the Atomic Energy Act constitute all of the radioactive materials that are utilized by man in quantity.[12] By definition, they include all radioactive substances produced by man in nuclear reactors during the fission process, as well as uranium and thorium which are the naturally occurring fuel for the reactors.[13] Therefore, these AEA-regulated radioactive materials include all the radioactive materials utilized and produced in the generation of electricity, all such materials utilized and produced by the government in manufacturing atomic weapons, and the vast majority of these materials used in

[11]United States Atomic Energy Commission, *Nuclear Terms: A Glossary* (2d ed. n.d.). The *Glossary* uses the term "radioactive material" as part of numerous definitions of more specialized terms, but never defines the term itself, and defines the term "radioactive" extremely broadly as "exhibiting radioactivity or pertaining to radioactivity." *Id.*, at 47.

[12]Naturally-occurring radioactive materials and accelerator produced isotopes are all that is left to FWPCA regulation. 40 CFR § 125.1 (y) (1974). While radium is the only naturally occurring radioactive material that man uses in any amount, radium discharges are extremely small compared to those of AEA-regulated radioactive materials. Battelle Memorial Institute, Pacific Northwest Laboratories, *Program for Management of Hazardous Wastes* 153, Table 19 (1973) (prepared for the Environmental Protection Agency) [hereinafter cited as *EPA Hazardous Wastes Report*]. Accelerator produced isotopes are not even mentioned as a source of radioactive release to the environment in the Battelle-EPA survey. *Id.*

[13]*See* Brief for Petitioners, at 20 nn. 3-5.

industry, medicine, and university research.[14] The amount of other radioactive materials, which are not subject to the Atomic Energy Act and with which man is involved is, by comparison, minor.

Thus, the vast majority of radioactive materials discharged into water by point sources are the radioactive materials subject to the Atomic Energy Act.[15] If such materials are excepted, the exception has essentially devoured the rule and reduced the Act's reference to "radioactive materials" to virtually an empty gesture. This Court has emphasized that:

> It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires.
>
> *United States v. Menasche,* 348 U.S. 528, 538-39 (1955).

[14]A study of hazardous wastes commissioned by the Environmental Protection Agency discussed the relative importance of different sources in generating radioactive wastes in general as follows:

> In summary, the primary source of radioactive wastes in the future will be a rapidly growing commercial power industry. The second major source will be the Federal government, specifically the Atomic Energy Commission (AEC), where large inventories of wastes have been generated from past weapons production and current production rates are still significant. In addition, a small amount of miscellaneous medical, research and development, and industrial applications.
>
> *EPA Hazardous Wastes Report, supra* note 12, at 168.

See also Table 19 which summarizes the projected sources of all radioactive wastes in 1980. *Id.*, at 153.

[15]The Court below made the point well:

> We are advised in the instant case that 'by-product material,' 'source material,' and 'special nuclear materials' constitute virtually all of the radioactive materials that are of significant concern to water quality, and if such materials are excepted from the [FWPCA] then the exception is devouring the general policy of the statute.
>
> 507 F.2d, at 749.

Congress itself has utilized the term "radioactive material" or its equivalent in other legislation. By consistent action, Congress has demonstrated that it will not create an exception of the scope sought here without providing for it in express statutory language. Where Congress has used the term without explicit limitation, the phrase has been intended to include all radioactive materials. When Congress has sought to exclude from a statute those radioactive materials subject to the Atomic Energy Act, it has done so in formal statutory language.

For example, in the Radiation Control for Health and Safety Act, 82 Stat. 1173, 42 U.S.C. § 263(b) *et seq.* (1970), which regulates electronic product radiation, Congress did exclude AEA-regulated materials from the Act, but it did so in the statute:

> (a) The Secretary [of Health, Education and Welfare] shall conduct the following studies . . .:
>
> (1) A study of present state and Federal control of health hazards from electronic product radiation and other types of ionizing radiation, which study shall include but not be limited to . . .
>
> (A) control of health hazards from *radioactive materials other than materials regulated under the Atomic Energy Act of 1954* . . . .
>
> 42 USC. § 263(e) (1970) (emphasis added).

Similarly, the House-passed version of the Water Quality Improvement Act of 1970, 84 Stat. 91 (in a provision that was omitted in the Conference bill) utilized explicit statutory language to exclude AEA-regulated radioactive materials:

> . . . matter means any substance of any description or origin, other than oil, dredged spoil, and human body wastes and the wastes from toilets and other receptacles intended to receive or retain human body wastes, which, when discharged into the navigable waters of the United States or the waters of the contiguous zone in substantial quantities, presents, in the judgment of the Secretary, an imminent and substantial hazard to public health or welfare, including fish, shellfish, and wildlife, and shorelines and beaches, *but such term does not include byproduct material, source material, and special nuclear material as defined in the Atomic Energy Act.* . . .
>
> H.R. 4148, 91st Cong., 1st Sess. § 17(a) (2) (1969) (emphasis added).

By contrast, the Safe Drinking Water Act (SDWA), 88 Stat. 1660, 42 U.S.C.A. § 300f (Supp. Feb., 1975), enacted on December 6, 1974, employs no exception or limitation in defining "contaminant" to include *"radiological substance or matter."* 42 U.S.C.A. § 300(f)(6) (Supp. Feb., 1975) (emphasis added). The phrase—used without qualification—encompasses AEA-regulated materials.[16]

In short, the term "radioactive materials" as used in both its popular and technical senses and as it

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[16]This is confirmed by the House Report, which states:

> [42 U.S.C.A. § 300f(6) (Supp. Feb. 1975)] defines 'contaminant' to mean 'any physical, chemical, biological, or radiological substance or matter in water.' *This, of course, would include any radioactive materials whether or not they originated from any source under the jurisdiction of the Atomic Energy Commission.*
>
> H. Rep. No. 93-1185, 93d Cong., 2d Sess. 16 (1974) (emphasis added).

has been used by Congress in other legislation means *all* radioactive materials.[17] The meaning which petitioners would ascribe to the term by excluding AEA-regulated radioactive material is strained and unnatural. This Court will not accept such a construction of a statutory phrase. *Woolford Realty Co. v. Rose,* 286 U.S. 319, 327 (1932).

D. Since Congress Wrote Exceptions Into The Statute, Further Exceptions Cannot Properly Be Implied.

A decision to exclude AEA-regulated materials from the phrase "radioactive materials" would, therefore, give the statutory language an unnatural meaning, as well as a narrow reading in a context that demands a broad one. In addition, such an interpretation would create by implication a major exception despite the fact that Congress wrote other specific exclusions into the definition of pollutant, and chose not to include the exclusion which petitioners seek. 33 U.S.C. § 1362(6) (A) and (B) (Supp. II, 1972). This Court has held on numerous occasions that when a statute contains specific exceptions, no other ex-

[17]Even in the debate on the FWPCA, it is clear that congressmen understood that the unqualified phrase had this broad meaning. When Congressman Wolff offered an amendment to the House version of the FWPCA which was directed at insuring that the states could regulate all radioactive materials which were discharged into water, 1 Leg. Hist. 542, the entire debate on the amendment proceeded on the assumption that the term "radioactive materials" referred to all such materials whether or not subject to AEA regulation. For example, Congressman Price stated as to "radioactive materials the target of the Amendment is the Atomic Energy Act." 1 Leg. Hist. 542-43. Congressman McCormack, after stating that he had been a "nuclear research scientist at the Hanford atomic energy plant" for 20 years, proceeded with his presentation on the assumption that the unqualified use of the term "radioactive materials" meant *all* such materials. 1 Leg. Hist. 549-50.

ceptions are to be read into the statute. As Mr. Justice Story stated, "[it is a] well-known maxim that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted." *Bend v. Hoyt,* 38 U.S. (13 Pet.) 263, 271-72 (1839). *Cf. Dameron v. Brodhead,* 345 U.S. 322, 326 (1953); *Pampanga Sugar Mills v. Trinidad,* 279 U.S. 211, 215 (1929); *Kendall v. United States,* 107 U.S. (17 Otto) 123, 125 (1882).

In a case analogous to the case at bar, involving a claim of exemption from the Fair Labor Standards Act, Mr. Justice Frankfurter, on behalf of the Court, stated:

> A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispersing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.
>
> *Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 617 (1944).

This statement is the generally accepted rule. A noted commentator on statutory construction has written:

> It has been held that exceptions are not to be implied. Especially where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. *An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated.*
>
> 2A J. Sutherland, *Statutes and Statutory Interpretation* § 47.11 (4th ed. 1973) (emphasis added).

The Court below followed this rule of construction in unanimously holding that all radioactive water pollutants were subject to FWPCA regulation: "[W]here a statute contains express exceptions, the courts should be exceedingly slow in implying unexpressed exceptions, lest the courts thereby thwart the legislative intent." 507 F.2d, at 748.

If Congress as a whole had intended to exclude AEA-regulated radioactive materials from the FWPCA, such a major exception would have been included in the list of statutorily authorized exceptions. Significantly, the exemptions that Congress did grant are exceedingly narrow. It is ironic that the government now seeks to create by implication an exception far broader and more significant than the only two Congress would permit.

E. Petitioners' Interpretation Is Inconsistent With Other Express Provisions Of The FWPCA.

To create the exclusion for AEA-regulated radioactive material that petitioners seek would conflict with several other provisions of the FWPCA and make the Act internally inconsistent. First, the FWPCA defines "pollution" as the "*man-made or man-induced alteration* of the chemical, physical, biological and *radiological* integrity of water." 33 U.S.C. § 1362(19) (Supp. II, 1972) (emphasis added). The overriding purpose of the FWPCA is to abate water pollution. Congress formally declared its understanding that such pollution included "man-made" or "man-induced" alteration of the "radiological integrity of water."

Yet if petitioners' position is adopted, the vast majority of "man-made" or "man-induced" radioactivity would not be covered by the FWPCA. *See* discussion *supra,* at pp. 22-23. Such an exclusion would render virtually meaningless Congress' declaration that one of the FWPCA's express goals was to restore and maintain the radiological integrity of water. This Court "cannot interpret federal statutes to negate their own stated purposes." *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 419-20 (1973) (Powell, J.).

A second provision of the FWPCA specifically prohibits the discharge of certain materials into water and indicates that Congress fully intended the FWPCA to apply AEA-regulated radioactive materials. Among the materials the FWPCA makes it "unlawful to discharge" are "any radiological . . . warfare agent" and "high-level radioactive waste." 33 U.S.C. § 1311(f) (Supp. II, 1972). Both of these terms refer *only* to AEA-regulated materials.[18] If the FWPCA completely exempted such materials from its regulatory scheme, section 1311(f)'s direct regulation of AEA-regulated radioactive materials would

[18] "High-level radioactive wastes" are defined by NRC Regulations as "those aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels." 10 C.F.R. Part 50, Appendix F, § 2 (1975). The only sources for the production of "radiological warfare agents" are ERDA's production facilities. Again by definition, such facilities and such materials come within the definitions of source material, by-product material, and special nuclear material regulated by the Atomic Energy Act. See note 13, *supra.*

be inconsistent with the scope of the rest of the FWPCA.[19]

Moreover, the precise wording of section 1311(f) emphasizes that Congress recognized that the FWPCA applies to AEA-regulated materials. Specifically, the section provides:

> *Notwithstanding any other provision of this chapter,* it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or *high-level radioactive waste* into the navigable waters.
>
> 33 U.S.C. § 1311(f) (Supp. II, 1972) (emphasis added).

For Congress to prohibit the discharge of "high level radioactive waste" "notwithstanding any other provision of *this chapter*" recognizes that "this chapter" —the FWPCA—creates a permit system that applies to such radioactive waste and that might permit its discharge. On the other hand, if such materials were excluded from the FWPCA, as petitioners contend, the phrase "[n]otwithstanding any other provision of this chapter" would be meaningless since "this chapter," the FWPCA, could have no possible application to AEA-regulated radioactive materials such as "high-level radioactive waste."

Finally, the provision governing new sources suggests that the FWPCA applies to nuclear facilities licensed under the Atomic Energy Act. The FWPCA

[19]Indeed, under petitioners' theory of the case, section 1311(f) is surplusage since petitioners contend the Atomic Energy Act and its regulations already prohibit the discharge of high-level radioactive waste. Brief for Petitioners, at 36 n. 25.

requires the EPA Administrator to establish "national standards of performance" for newly constructed point sources of pollution. 33 U.S.C. § 1316 (Supp. II, 1972). This provision enumerates a minimum list of industrial categories for which EPA must set standards, including, *inter alia,* "steam electric power plants." 33 U.S.C. § 1316(b) (1) (A) (Supp. II, 1972). Some electric power plants manufacture the steam needed to generate electric power by burning fossil fuels; others manufacture the steam by using the heat generated by nuclear fission in a reactor.[20] The Federal Power Commission in the *1970 National Power Survey* (promulgated in December 1971 and available at the time Congress was debating the FWPCA), estimated that almost one-half of all steam electric power plants in service in

[20]EPA describes the process by which nuclear plants generate electricity as follows:

> *A light-water-cooled nuclear power station operates on the same principle as a conventional fossil-fueled (oil or coal) power station except that the heat generation is by nuclear fission rather than combustion. The heat liberated in either process is used to convert water into steam.* The steam enters a three-stage turbine consisting of one high-pressure stage and two low-pressure stages. The turbine consists of a common central shaft attached to a circular array of curved blades. The steam impacts on these blades turning the rotor at high speeds. The turbine shaft is connected to a wire wound armature in the generator. This armature rotates in an applied magnetic field producing alternating electric current.
>
> After passing through the turbine the low pressure steam passes through a condenser where the steam transfers its remaining heat to the condenser cooling water and is condensed back into water and is recycled into the boiler. The heated condenser cooling water may be released directly to the environment in a single-pass open-cycle cooling system.
>
> United States Environmental Protection Agency, *Environmental Analysis of the Uranium Fuel Cycle—Part II Nuclear Power Reactors* 3 (November, 1973) (emphasis added).

1990 would be nuclear powered. *Id.*, at 1-1-18, Table 1.3. The exclusion of AEA-regulated radioactive materials from the FWPCA's definition of pollutant would exempt one of the two major types of pollution that will be produced by nuclear "steam electric power plants."[21] Yet Congress specifically indicated that such plants should be regulated under the FWPCA.

In summary, to create the exclusion petitioners seek would be inconsistent with the Act's definition of pollution and with its regulation of high-level radioactive wastes, radiological warfare agents, and steam electric power plants.[22]

[21]The main water pollutants from nuclear steam generating stations are waste heat and AEA-regulated nuclear materials. *See, e.g.*, University of Oklahoma—Science and Public Policy Program, *Energy Alternatives: A Comparative Analysis* 6-32 (May, 1975) (prepared for the Council on Environmental Quality, ERDA, NRC, EPA, Federal Power Commission, National Science Foundation and Department of the Interior) [hereinafter cited as *Energy Alternatives*].

[22]To exclude AEA-regulated materials would also frustrate the Congressional desire to provide careful regulation for hazardous and toxic materials, under the FWPCA.

The FWPCA also provides for the regulation and imposition of penalties for the discharge of "hazardous substances" in harmful amounts, 33 U.S.C. § 1321 (Supp. II, 1972), and establishes as a national policy a prohibition on the discharge of toxic pollutants in toxic amounts. 33 U.S.C. §§ 1251(a)(3), 1317 (Supp. II, 1972). The specific and elaborate regulatory provisions governing these types of pollutants—as well as the FWPCA's legislative history—demonstrate that control of these types of materials was a primary concern of the Act.

Radioactive materials are indisputably toxic and hazardous in the sense in which the terms are used in the FWPCA. *See* 33 U.S.C. §§ 1321(b)(2)(A), 1362(13) (Supp. II, 1972). Indeed, William Ruckelshaus, then Administrator of the EPA, in testimony on the original administration version of the FWPCA, stated that the hazardous substances to be regulated under the FWPCA would include AEA-regulated radioactive materials such as "uranium-233 and iodine-129 and other radioactive materials and mixtures with equally dangerous properties and effects." *Hearings on Water Pollution Control Legislation before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong., 1st Sess., pt. 1, at 81 (1971). *See also EPA Hazardous Wastes Report, supra* note 12; Resource Recovery Act, 84 Stat. 1227, 42 U.S.C. § 3254f (1970).

Respondents respectfully submit that for the Court to create the exception for which petitioners contend would do extreme violence to the text of the Act and would fail to honor both the congressional directives and the decisions of this Court that require that the FWPCA be given a liberal interpretation.[23]

II. THOUGH UNNECESSARY AND INAPPROPRIATE IN LIGHT OF THE ACT'S CLEAR LANGUAGE, AN ANALYSIS OF THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS SPECIFICALLY DECIDED NOT TO EXEMPT AEA-REGULATED RADIOACTIVE MATERIAL FROM REGULATION UNDER THE FWPCA.

The language of the FWPCA plainly and unambiguously defines "pollutant" to include all radioactive materials including those regulated under the Atomic Energy Act. As we have demonstrated, this straightforward and unavoidable interpretation of the

[23]The petitioners have appropriately not argued that this Court should defer to the administrative interpretation that has been placed on the definition of the term "radioactive materials". This case presents a purely legal issue involving a question of congressional intent and no claim of agency expertise. Moreover, the record in the present case reveals considerable uncertainty over EPA's position on the issue. *See* pp. 5-7, *supra*. "The Courts are the final authorities on issues of statutory construction [citation omitted], and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute'." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 727, 745-46 (1973) (Marshall, J.).

FWPCA's language is both reinforced by and consistent with (1) the natural meaning of the term "radioactive material," (2) numerous other provisions of the FWPCA, (3) the purposes and policy of the FWPCA, and (4) a liberal construction of the statute's terms, as Congress intended and as decisions of this Court require.

Nonetheless, based on carefully selected portions of the FWPCA's legislative history which are generally presented out of context, petitioners urge this Court essentially to read the term "radioactive materials" out of the FWPCA's definition of pollutant. Most improperly, petitioners attempt to use legislative history to create ambiguity, not to solve it, since the FWPCA is both clear and consistent on its face. This Court has held that it will not use legislative history for such a purpose. *See United States v. Shreveport Grain and Elevator Co.,* 287 U.S. 77, 83 (1932).

Furthermore, this Court has emphasized there is no need to resort to legislative history under circumstances similar to this case: "Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act." *United States v. Oregon,* 366 U.S. 643, 648 (1961). *See Ex parte Collett,* 337 U.S. 55, 61 (1949); *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945); *United States v. Missouri Pac. R. Co.,* 278 U.S. 269, 278 (1929).

Respondents therefore conclude, based on earlier decisions of this Court, that resort to legislative history in the present case is inappropriate and unwarranted. However, in view of the heavy reliance petitioners place on isolated portions of the legislative history, respondents will simply seek to place the full legislative record before the Court. Before approving the creation of a substantial exemption from the FWPCA, the Court must carefully consider whether Congress can in any sense be said to have intended such a result.

When the Tenth Circuit examined the congressional materials on which the government relies, the three-judge panel unanimously concluded they were "conflicting and inconclusive," 507 F.2d, at 748, and provided no basis for overriding unambiguous statutory language. Respondents believe that the legislative history, when considered fully and in context, simply reinforces the conclusion that Congress intended the term "radioactive materials" to have its natural meaning and intended that AEA-regulated radioactive effluents be required to meet the same pollution reduction standards as any other industrial releases.

Specifically, an objective reading of the record establishes that the Senate consistently rejected efforts to limit the scope of the FWPCA, as did the Conference Committee. The only solace available to petitioners derives from a concerted and orchestrated effort by a number of Representatives in the House to obtain approval for exempting AEA-regulated materials from the regulatory scheme of the FWPCA. Undeniably, some members of the House of Representatives favored the exemption for which the gov-

ernment is now contending. Respondents respectfully submit, however, that this Court should not grant here a political victory to a political minority that could attain its objectives neither in the House Public Works Committee, nor on the floor of the House, nor in the Conference Committee.

A. The Senate Bill Fully Intended To Cover All Radioactive Materials Discharged Into Water.

The FWPCA originated in the Senate. Following two years of extensive hearings on water pollution legislation, the Subcommittee on Air and Water Pollution and the full Senate Committee on Public Works conducted 45 executive sessions in 1971 marking up a bill. The bill was reported out of Committee on October 28, 1971. As reported, S.2770 defined "pollutant" as follows:

> (f) The term 'pollutant' means, ***but is not limited to,*** dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, ***radioactive materials,*** heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, agricultural, ***and other waste*** introduced into water: Provided, ***it does not mean*** (1) 'sewage from vessels within the meaning of section 312 of this Act; or (2) water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located.
>
> 2 Leg. Hist. 1697-98 (emphasis added).

In explaining this definition, the Senate Committee's Report emphasized the importance of defining "pollutant:"

> For the first time the Committee would add to the law a definition of the term pollutant. In order to trigger the control requirements over addition of materials to the navigable water, waters of the contiguous zone and the ocean, it is necessary to define such materials so that litigable issues are avoided over the question of whether the addition of a particular material is subject to control requirements.
>
> 2 Leg. Hist. 1494.

The Committee went on to point out that the definition was drawn "so that before *any* material can be added to the navigable waters authorization must first be granted" by EPA. *Id.* (emphasis added).

The purpose of the Committee to bring *every* conceivable material within the FWPCA's ambit is plain: The Committee's definition explicitly states that the definition of "pollutant" is *"not limited to"* the virtual laundry list of materials set out. Indeed, seeking to gain the widest possible scope, the definition even includes a residual category of "other wastes." In addition, the Senate Report emphasizes that the definition contains two "specific" exceptions, strongly implying that no further exceptions were contemplated. *Id.* Interpreted in light of the stated intent of the Committee to cover "any" material, and the indisputably broad language of the section in which it appears, the phrase "radioactive materials" can only be taken to have its normal meaning and

refer to all such materials, which would of course include AEA-regulated radioactive materials.[24]

In fact, the Senate Committee's Report provides an even more explicit indication of the Committee's intent. Section 306 of the Senate bill (corresponding to 33 U.S.C. § 1316 (Supp. II, 1972) in the FWPCA as enacted) required the EPA Administrator to set "standards of performance" for specified industrial categories. (These standards require newly constructed sources to apply the best available technology to reduce pollution.) The section's provisions listed 28 industrial categories for which such standards were to be set and directed that the EPA Administrator add additional categories as appropriate. In discussing this section, the Senate Report notes that the Committee "agreed not to include in its list of new sources nuclear fuels processing plants," 2 Leg. Hist. 1477, since EPA did not have the technical capability to establish effluent controls for reprocessing plants "at this time." However, the Committee's report went on to state unequivocally that "the Committee expects that EPA will develop the capability," and continued:

> The Bureau of Radiological Health, which was transferred to the Environmental Protection Agency should have the capacity to determine those levels of control which can be achieved for nuclear fuels processing plants. If they do not, such a capability should be developed and this particular source should be added to the list of new sources as soon as possible.
>
> *Id.*

[24]See pp. 21-22, *supra*.

It would be difficult to imagine a clearer indication that the Committee intended that EPA's Bureau of Radiological Health regulate the radioactive releases from nuclear fuels processing plants. Since the radioactive materials released by these plants are exclusively[25] source, by-product and special nuclear materials, the conclusion is unavoidable that the Senate Committee intended that AEA-regulated effluents be subject to the FWPCA.[26] The fact that there was no discussion of any jurisdictional problem simply underscores the extent to which the Committee was committed to comprehensive regulation.

Thus, even without resort to the general statements indicating the Committee's intent to draft an all-inclusive pollution control statute,[27] the Senate Report demonstrates a clear intent to include within the coverage of the FWPCA the release of all radioactive materials to navigable waters.

[25]*Energy Alternatives, supra* note 17, at 6-35, Table 6-14; M. Eisenbud, *Environmental Radioactivity* 296, Table 11-2 (2d ed. 1973).

[26]Petitioners' lame explanation, Brief for Petitioners, at 39 n. 29, that the Senate Committee intended EPA to have authority over only the non-radiological releases from such plants is ludicrous. In 1970, the Bureau of Radiological Health to which the Senate Committee specifically refers, made a study of the liquid effluents of nuclear fuels reprocessing plants. The study involved *only* AEA-regulated radioactive materials discharged by these plants. Bureau of Radiological Health, *Liquid Waste Effluents from a Nuclear Fuel Reprocessing Plant* (November, 1970). *See also* Bureau of Radiological Health, *An Investigation of Airborne Radioactive Effluent from an Operating Nuclear Fuel Reprocessing Plant* (July 1970), Bureau of Radiological Health, *An Estimate of Radiation Doses Received by Individuals Living in the Vicinity of a Nuclear Fuel Reprocessing Plant* (1970).

[27]*See, e.g.*, 2 Leg. Hist 1269-70 (Statement of Senator Randolph).

No amendments were offered to the definition of pollutant on the Senate floor. Petitioners, however, emphasize a colloquy between Senator Muskie and Senator Pastore that occurred early in the floor debate on S.2770. Against the background of the statute's unqualified language and the statements in the Senate Report, it would be difficult to rest a finding of congressional intent on the isolated remarks of two Senators. *United States v. O'Brien,* 391 U.S. 367, 384 (1968); *United States v. Oregon,* 366 U.S. 643, 648 (1961); *Duplex Co. v. Deering,* 254 U.S. 443, 474-75 (1921).

In any event, petitioners have placed a gloss on the discussion that cannot withstand analysis. Senator Pastore asked Senator Muskie, "Does this measure that has been reported by the Committee in any way affect the existing law, that is the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?" 2 Leg. Hist. 1265-66. Senator Muskie replied that it did not. *Id.* At the outset it should be noted that Senator Pastore's terminology obviously assumes that the phrase "radioactive material" applies to the type of materials regulated by the AEC., since he uses that phrase to describe the materials subject to AEC regulation. As Vice-Chairman of the Joint Committee on Atomic Energy, Senator Pastore's understanding of the connotation of the phrase is certainly entitled to some weight.

In general, this floor debate merely reiterates that the FWPCA does not alter the regulatory authority

of the AEC with respect to its statutory responsibilties under the 1954 Atomic Energy Act. There was no discussion of any exclusions from the meaning of the term "radioactive materials" in the FWPCA. Indeed, the tone of Senator Pastore's question seems to assume that the FWPCA regulates the discharge of AEA-regulated radioactive materials and that he is merely seeking to clarify the extent of the impact on the AEA. If he thought there were a question about whether the FWPCA applied to such materials, he would surely have asked about the scope of the FWPCA, rather than about its impact on the AEA.[28]

But whatever Senator Pastore meant to ask, and whatever Senator Muskie intended by his response, the colloquy did not end with that single exchange. And the remainder of the Pastore-Muskie discussion establishes that Senator Muskie believed—and the Senate Committee believed—that the FWPCA's coverage included radioactive materials regulated by the Atomic Energy Act.

Senator Muskie continued that *"in addition"* he wanted to discuss litigation (*Northern States Power Co. v. Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972) dealing with the more precise question of "the setting of effluent limitations as they involve nuclear power plants." He

[28]In fact, Senator Pastore's question is quite ambiguous in another respect, since it does not refer to the AEC's regulatory authority over "utilization and production facilities" under which the AEC regulates the effluent from nuclear power plants and other licensed facilities. *Compare* 10 C.F.R. Parts 30, 31, 36, 40, 70 (1975) *with* 10 C.F.R. Part 50, esp. §§ 50.34a and 50.36a (1975).

told Senator Pastore that "the committee considered speaking specifically to that decision [*Northern States Power*], but chose to remain silent so as not to prejudice the decision or any appeal from it." 2 Leg. Hist. 1266. The most salient feature of this response is the simple fact that the Committee would have had no occasion to speak to the *Northern States Power* case unless the FWPCA applied to radioactive materials subject to the AEC's jurisdiction. If the Act had the narrow scope claimed by petitioners, *the Northern States Power issue could never have arisen.* Thus Senator Muskie's act of raising the issue of *Northern States Power* and indicating that the Committee *chose* not to speak to the case, *not* because the FWPCA did not extend to the type of materials involved in *Northern States Power,* but because the Committee did not want to take a position on preemption, establishes beyond a doubt that Senator Muskie and the Committee assumed and intended that the FWPCA applied to radioactive materials regulated by the AEC.

In short, the language of the Senate bill, the contents of the Senate Report, and the brief exchange between Senators Muskie and Pastore establish that the definition of "pollutant" included in the Senate-passed bill encompassed all radioactive materials, including those regulated by the AEC.

B. House Supporters Of An Exception For AEA-Regulated Materials Failed To Win Its Inclusion In Their Bill, Had Uncertain Support On The Floor, And Recognized Their View Conflicted With That Of The Senate.

Following Senate passage of S.2770, the House Committee on Public Works, which had been considering a separate set of water pollution bills, took up consideration of the Senate bill. On March 11, 1972, the House Committee reported a bill, largely based on the Senate bill, though with amendments. The definition of pollutant in the House bill was identical to the Senate language *except that it added two further exceptions to the definition* (certain thermal discharges and organic fish wastes). 1 Leg. Hist. 1068.[29]

Once again, "radioactive materials" were included without limitation in the definition. But, as petitioners have noted, the House Report states that the radioactive materials referred to "are those not encompassed in the definition of source, by-product, or special nu-

[29]The full text of the House definition reads as follows:

(6) The term 'pollutant' means, but is not limited to, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials,* heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, agricultural, and other waste discharged into water. This *term does not mean* (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines the injection or disposal of such water, gas, or other material will not result in the degredation of ground or surface water resources; or (C) thermal discharges in accordance with regulations issued pursuant to section 316 of this Act; or (D) organic fish wastes.

1 Leg. Hist. 1068 (emphasis added).

clear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act." 1 Leg. Hist. 818.

Significantly, however, although the House Committee added two other explicit exceptions to the House bill's definition of pollutant, the discussion of AEC-regulated radioactive materials only reached the status of language in the House Report. Moreover, the language in the House Report—which stated that the radioactive materials referred to in the definition were those not regulated by the AEC—actually went only half way, because the House bill's definition of pollutant explicitly stated it was "not limited to" the materials listed. To establish an exception it was necessary not merely to omit a particular material from the listed materials, but also to write an affirmative exception. And the House Committee evidenced its understanding of this requirement by writing into the statute's definition of pollutant two specific exceptions not found in the Senate bill, 2 Leg. Hist. 1697-98. Since the discussion in the House Report makes clear that the case for the exception was made forcefully in Committee, the fact that the AEC's supporters could not win its inclusion in the bill itself suggests that the provision simply lacked the necessary support.

In any event, courts have recognized that committee reports offer limited evidence of congressional intent:

> . . . [W]e feel that the statement above mentioned in the House Report is not the criterion by which the courts must be guided in the future. The House Report, in this regard, was not agreed to in the Senate Report, nor was any mention made of it in the Conference Report. The report of a committee of the House 'does not go very far to show the intention of both houses of Congress.'
>
> *Davidson v. Gardner,* 370 F.2d 803, 828 (6th Cir. 1966).

See In Re Evans, 452 F.2d 1239, 1245 (D.C. Cir. 1971), *cert. denied,* 408 U.S. 930 (1972) ("While reports are unquestionably entitled to weight in determining the purpose of any statute, they are neither enacted by Congress nor signed by the President, and thus they do not have the force of legislation."); *United States v. Rohm and Haas Co.,* 500 F.2d 167, 173 (5th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

The debate on the floor of the House evidences primarily a confusion over the scope of the bill's coverage. Most of the debate occurred on an amendment, offered by Congressman Wolff, that addressed one issue: the extent to which states would be permitted to regulate radioactive materials discharged into the environment. The amendment had nothing to do with the definition of "radioactive materials."[30] There are

[30]The Wolf amendment reads as follows:

> (b) Nothing shall preclude or deny the right of any State or political subivision [sic] thereof or interstate agency, with respect to radioactive materials and thermal discharges, to adopt or enforce any standard or limitation respecting the release of radioactive materials and thermal discharges into water, or any requirement respecting control or abatement of pollution from such radioactive materials and thermal discharges; except that if an effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, standard of performance, or regulation relating to radioactive materials or thermal discharges is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard,

three important aspects to the debate on the Wolff amendment. First, the text of the amendment related to the right of the states to regulate "radioactive materials." In the extended debate over that amendment, not one speaker had any doubt that the phrase "radioactive materials" in the Wolff amendment referred to radioactive materials regulated by the AEC. If that phrase had the narrow meaning ascribed to it in the House Report, the Wolff amendment would have been meaningless, only giving the states the right to regulate non-AEA regulated materials, a right which the states already possessed. Thus, the debate over the amendment suggests that House members understood the phrase "radioactive materials" to include those regulated by the AEA.

Second, at the outset of the debate on the Wolff amendment, the Chair of the House, in ruling on a point or order, determined that the FWPCA applied to AEA-regulated radioactive materials. Opponents of the Wolff amendment raised essentially the claim which the petitioners make in this Court. Specifically, Congressman Price sought to convince the Chair that the FWPCA did not apply to AEA-regulated materials. Since the Wolff amendment clearly applied to such materials, Congressman Price argued it was not germane to the FWPCA. The Chair rejected Price's position, indicating his understanding that the FWPCA applied to AEA-regulated radioactive ma-

standard of performance, or regulation relating to such radioactive materials or thermal discharges which is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, standard of performance, or regulation under this Act.

1 Leg. Hist. 542.

terials. 1 Leg. Hist. 544. The significance of this ruling was recognized later in the debate by Congressman Hosmer, who noted that this parliamentary ruling "was decided upon a definition of the words 'radioactive material'." 1 Leg. Hist. 588.

Third, even beyond the Chair's ruling on the point of order there was considerable divergence of views concerning the extent of the House bill's coverage. Thus, in speaking on the Wolff amendment, Congressman Frenzel itemized the numerous mentions in the bill of radioactive materials and summarized his views this way:

> Mr. Chairman, the entire bill is shot full of references to thermal discharges and radioactive wastes. Clearly it was the intent of the committee and the bill's authors to provide for control of these types of pollution.
>
> 1 Leg. Hist. 543.

In addition, Congressman Wolff himself expressed the view that effluent limitations regarding the discharge of radioactive pollutants would be set under the FWPCA and that his amendment would merely assure that states would be permitted to go beyond those standards. 1 Leg. Hist. 544. Finally, Congressman McClory saw the Wolff-Frenzel amendment as simply making "eminently clear that we are controlling nuclear and thermal pollution in this bill." 1 Leg. Hist. 555.

The next day, Congressman Frenzel rose on the floor of the House to repeat the views that he had first expressed during the debate on the Wolff amendment:

In the definition section 502, radioactive waste is defined as a pollutant. Reference to radioactive wastes are made elsewhere throughout the bill. My statement on page H2622 of yesterday's Record details other references in the bill [1 Leg. Hist. 543]. . . .

No matter what kinds of discussions may take place on the floor of this House, it seems to me quite obvious in the legislation itself that it was a clear intent to include all kinds of pollution except the four specified exemptions in section 502 (6) A, B, C, D. No matter what some of our Members would like to be the intent of the bill, the bill is quite clear in this respect and needs no amplification. As long as the bill has stipulated what is to be exempted and what is to be controlled, nothing that is said on the floor of the House can change the language of this bill.

1 Leg. Hist. 746.

Thus, while there was sentiment on the part of some Representatives that AEA-regulated materials should not be regulated under the FWPCA, this sentiment never obtained the status of legislative language, was certainly not expressly shared by a majority of the members of the House of Representatives, and in the end only produced considerable confusion in the course of the House debates.

With the record in this state, the House passed the FWPCA and sent it to the Conference Committee. Moreover, it should be emphasized that House supporters of the exemption recognized that their last chance to secure an exemption was in the Conference

Committee. This in itself strongly suggests that the supporters of the exemption in the House recognized that at least the Senate version was clearly contrary to their views. Thus, Congressman Holifield stated his concern quite forcefully to one of the House managers: "I assume it is the intent of the gentleman, if he is one of the managers of the bill in Conference, to *try* to sustain . . . [the exemption] to the best of his ability." 1 Leg. Hist. 588 (emphasis added). Certainly, if Congressman Holifield thought that the Senate would agree to exempt AEA-regulated materials from the FWPCA, there would have been little point in calling on a House manager to "try to sustain" such an interpretation "to the best of his ability."[31]

C. The Conference Committee Revised The Definition Of Pollutant And Rejected Any Limitation.

The Conference Committee, in the words of Senator Muskie:

> held 39 meetings . . ., often starting early in the morning and running late into the evening.
>
> I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. . . .
>
> I would like to call attention to the fact that we have tried in this legislation not to leave the final evaluation of the bill to legislative history, but

[31]Congressman Holifield's statement also strongly suggests that he recognized that the normal meaning of the phrase "radioactive materials" included AEA-regulated radioactive materials and that a special effort was required to establish that such materials did not come within the FWPCA.

instead to write into the law as clearly as possible the intent of Congress.

1 Leg. Hist. 161-64.

The intensity of effort devoted to the Conference coupled with Senator Muskie's declaration that the Conference attempted to write the law as clearly as possible simply underscores the importance of carefully analyzing the action of the Conference Committee.[32]

There is little doubt that the Committee focused its attention on the definition of pollutant. The Conference accepted the definition of neither the House nor the Senate, but rather substituted a revised definition. 1 Leg. Hist. 326-27. (Petitioners' statement to the contrary, Brief for Petitioners, at 46, flatly misstates the Conference Report.[33]) The new Conference definition involved three significant changes. First, the Conference eliminated the provision in both the Senate and House definition providing that the term pollutant was "not limited to" materials specified in the definition. The revised Conference definition provided that the items listed establish the full meaning of the term.

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[32]See p. 19, *supra*.

[33]The Conference Committee Report stated its revision to the definitions section of the bill (section 502) as follows:

> Section 502 of the conference substitute is the same as the comparable provision of the Senate bill and the House amendment *with the following exceptions*:
>
> (1) *The definition of the term 'pollutant' contained in paragraph (6) has been amended to read as follows:*
>
> 1 Leg. Hist. 143 (emphasis added).

The Report then set out the full definition as revised by the Conference.

Second, the Conference dropped the reference to "other" wastes. Third, the Conference definition dropped the two specific exceptions that the House had added.

All three revisions suggest careful attention to the precise scope that the definition of "pollutant" would have. Moreover, the Committee's decision to drop the two exceptions that the House had written into its bill provides specific evidence that the Conference Committee carefully considered the scope of the definition.

In this context, the failure of the Conference to mention any exemption for AEA-regulated radioactive materials either in statutory language or in the Conference Report can only represent a conscious decision. The term radioactive materials was to have its full, natural meaning, and the standards of the FWPCA were to apply to the discharge of AEA-regulated materials.

Respondents believe there is no other serious interpretation that can be placed upon the action by the Conference Committee. If any doubt could be left, it is finally resolved by the startlingly different treatment accorded the Conference Report in the House and the Senate. In the House, Congressman Anderson of the Joint Committee on Atomic Energy sought to obtain once again from legislative history, what the exemption's supporters had been unable to accomplish in the Conference. 1 Leg. Hist. 226-27.

By contrast in the Senate, the exemption's supporters—if there were any—were noticeably quiet. Indeed, the only relevant exchange occurred between Senator

Buckley and Senator Muskie. Senator Buckley declared himself

> deeply concerned about clause 511(c)(2)(B) [33 U.S.C. § 1371(c)(2)(B) (Supp. II, 1972)]. This clause may, I understand, bar any Federal permitting or licensing agency, such as AEC, from imposing, as a condition precedent to the issuance of any license or permit, *any* effluent limitation other than limitations established pursuant to [the FWPCA].
>
> 1 Leg. Hist. 196 (emphasis added).

Senator Buckley's remarks demonstrate his reading of the Conference bill to bar the AEC from imposing "*any*" effluent limitation on its own authority. Such an observation would make little sense in relation to the AEC if the FWPCA did not apply to all radioactive materials.[34]

Following this remark Senator Buckley cited, by way of example, several news accounts of an AEC decision to require a closed cycle cooling system. Senator Buckley then asked two rapid-fire questions, (1) whether he was correct "that environmentalists will be barred from intervening in AEC licensing procedures in order to obtain tougher effluent limitations," and (2) whether environmentalists "particularly concerned about the effects of water pollution at, for instance the sites of proposed industrial power plants

[34]Petitioners have attempted to limit the persuasiveness of this discussion by claiming that it is related solely to thermal pollution. Brief for Petitioners, at 45 n. 33. However, Senator Buckley did not raise the question of thermal pollution (which he did only by way of example) until *after* this unqualified exchange had occurred.

are entirely at the mercy of EPA and the general, nationwide standards it has set?"

Senator Muskie responded:

> Mr. President, I am not sure I heard clearly all of the Senator's question, but if I may try to state it, the Senator is asking whether EPA, in its authority to set effluent limitations controls with respect to the subject matter which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes.
>
> Mr. Buckley: The AEC is precluded from setting higher standards than those imposed by EPA.
>
> Mr. Muskie: Does the Senator mean more rigorous from an environmental standpoint? I must say that such an action by AEC is not a possibility that occurred to the conferees. It has not occurred to me in my experience over the years. We considered that this kind of authority should be in EPA and not in AEC, and in order to put the authority there, we put it in this act, and that is where it is.
>
> Mr. Buckley: It is not the intention of the conference committee to exclude the right of other regulatory bodies to impose more stringent environmental conditions on discharges?
>
> Mr. Muskie: Again I must say yes, we gave the authority to EPA. The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment. It did not occur to us that AEC might be more conscientious in this respect than EPA, so we have given EPA the total authority on the assumption that the risk from AEC was not of the nature de-

scribed by the Senator but, rather, the opposite, as history demonstrates.

1 Leg. Hist. 198.

The sweep of the discussion fully establishes the underlying assumption of both Senators that under the Conference Committee's bill, EPA would have the basic responsibility to set effluent limitations over radioactive materials and that those limits would have to be accepted by the AEC. If some portion of the AEC's ability to set effluent limitations was to be preserved, it would surely have emerged during this lengthy and somewhat repetitious dialogue.

Indeed, it is remarkable that during the Senate debate on the Conference report the AEC served no less than *four* times as the example of a federal agency whose authority in setting effluent limitations would yield under the FWPCA to EPA. *See, e.g.*, 1 Leg. Hist. 183 (Statement of Senator Muskie); 1 Leg. Hist. 198 (Senator Buckley); 1 Leg. Hist. 202 (Statement of Senator Jackson); 1 Leg. Hist. 205 (Statement of Senator Jackson).

In summary, respondents believe the legislative history reveals a consistent position on the part of the Senate to create a comprehensive water pollution control statute that would cover radioactive materials in the same fashion as every other waste material. Respondents believe the Conference Committee adopted this approach and that the Senate adopted the Conference bill without even the hint of an exemption for AEA-regulated materials. While the

forces favoring such an exception were obviously stronger in the House, even there they did not succeed in winning approval of a statutory exception in Committee or on the floor. A narrow reading of a statutory phrase by a few members of one legislative branch, which was not adopted in Conference, cannot be used to limit the scope of the provision as adopted. *See United States v. Rohm and Haas Company,* 500 F.2d 167, 173 (5th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *Davidson v. Gardner,* 370 F.2d 803, 828 (6th Cir. 1966).

Thus, respondents respectfully submit that for this Court to create such an exception now by relying upon unsupportive legislative history would most inappropriately reverse a carefully considered and properly made legislative decision. Or, as well stated by Mr. Justice Rutledge: "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945). *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 412 n. 29 (1971) (Marshall, J.); *NLRB v. Plasterers' Local Union No. 79,* 404 U.S. 116, 129 n.24 (1971) (White, J.).

Moreover, the facts of the present case provide much weaker evidence of congressional intent than the Court confronted and rejected in *Train v. New York, supra.* There, the Court also examined the legislative history of the FWPCA to determine whether Con-

gress intended to give the President discretion to impound funds authorized for construction grants for certain municipal sewers and sewage treatment works. In that case, the Conference Committee had actually made some adjustments to the statutory language. 420 U.S., at 44. Yet the Court declined to read significance into this change, holding that "if Congress intended to confer any discretion on the Executive to withhold funds from this program at the allotment stage, it chose quite inadequate means to do so." *Id.* Writing for the Court, Justice White remarked: "But legislative intention, without more, is not legislation." 420 U.S., at 45.

Even the most forced reading of these congressional materials can unearth no more than an inchoate intent manifested only by some members of one branch. This intent, if that is what it is, can certainly not be said to have reached the levels of "legislation," particularly when measured against the standard of *Train v. New York*.

In sum, the legislative history of the FWPCA simply provides no basis for overriding the unambiguous statutory language of the Act, which defines "pollutant" to include all radioactive materials.

III. REGULATION OF RADIOACTIVE MATERIALS AS A POLLUTANT UNDER THE FWPCA WILL ELIMINATE PRESENT OVERLAPPING AUTHORITY AMONG EPA, NRC AND ERDA.

Petitioners advance a number of policy arguments in urging this Court to carve out an exception from the FWPCA for AEA-regulated radioactive materials.

Primarily petitioners contend that regulation of these effluents under the FWPCA would produce a "redundant" regulatory scheme. Brief for Petitioners, at 49. These arguments do not withstand scrutiny and ignore Congress' reasons for enacting the FWPCA as well as the current complexities of the relationship between NRC, ERDA and EPA.

A. Reliance On EPA's Extensive Radiation Protection Expertise To Set Effluent Limitations For Radioactive Materials Under The FWPCA Finally Ends, And Certainly Does Not Create, Redundant Regulation.

The FWPCA transferred the authority to set effluent limitations from the AEC to EPA. No "redundant" regulatory scheme is created: EPA simply sets discharge limits under the FWPCA as it does for all other industries including all other energy technologies. Indeed, giving EPA the authority to set effluent limits finally places in one agency coherent regulatory authority for controlling the release of radioactive materials into water.

1. EPA has extensive authority and experience in radiation protection.

From its inception, EPA has had broad responsibility to establish standards for the release of all radioactive materials into the environment. The Presidential order that established EPA, Reorganization Plan No. 3 of 1970, §§ 2(a)(6)-(7), 2(a)(3)(C), 84 Stat. 2086, 42 U.S.C. § 4321 (1970), gave EPA major responsibilities in the field of radiation protection, transferring to EPA authority and personnel from other agencies including the AEC. The authority

transferred included: (1) the functions of the Atomic Energy Commission's Division of Radiation Protection Standards to set generally applicable standards for the protection of the general environment from radioactive material; (2) all functions of the Federal Radiation Council which included advising "the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards . . ." 42 U.S.C. § 2021(h) (1970); and (3) many of the duties of the Bureau of Radiological Health, including review and evaluation of the public health factors of all nuclear facilities, assessment of population exposures to radiation, and assessment of radiation levels in the environment.[35]

Congress has added to EPA's radiation protection responsibilities not only in the FWPCA, but also in the Safe Drinking Water Act, 42 U.S.C.A. § 300(f)(6) (Supp. Feb., 1975) (EPA to regulate "contaminants" including "radiological substance or matter"). EPA's technical ability to establish standards for radioactive discharges from nuclear power plants can hardly be questioned.

[35]Bureau of Radiological Health, *ops. cit., supra* note 26. To carry out its broad radiation protection responsibilities, EPA has established an Office of Radiation which

> . . . . is responsible . . . for the radiation activities of the Agency, including development of radiation protection criteria, standards, and policies; development of methodology for measuring and controlling radiation exposure; development of research requirements for radiation programs; provision of technical assistance to States and other agencies having radiation protection programs; establishment and direction of a national surveillance and inspection program for measuring radiation levels in the environment; evaluation and assessment of the impact of new and developing radiation technology on man and the environment; assistance in the training of personnel for radiation protection programs in the States and for other purposes; and maintenance of liaison with other public and private organizations interested in environmental radiation.
>
> 40 C.F.R. § 1.29 (1975).

2. To implement efficiently EPA's general environmental radiation standards, the NPDES permits that EPA already issues to all point source nuclear power facilities should include effluent limits for all radioactive materials.

Since it was established, EPA has utilized its extensive radiation protection expertise and authority to set general radiation standards which limit the total amount of radioactivity discharged from major categories of sources. *See, e.g.,* 40 Fed. Reg. 23419 (May 29, 1975). However, with NRC setting effluent limits for commercial nuclear facilities and with ERDA setting effluent limits for government nuclear facilities, the present regulatory scheme creates overlapping and potentially conflicting authority. Petitioners, in discussing NRC, admit that constant effort is necessary

> lest AEC [NRC] license discharges resulting in degradation of the environment in excess of standards established by EPA, or EPA establish standards so stringent that they would require the AEC [NRC] to impose unattainable limitations on discharges from nuclear facilities.
>
> Brief for Petitioners, at 53.

The FWPCA finally unites in one agency the authority to set both the general environmental standards and the effluent limitations for individual sources that implement these standards—a significant improvement from the standpoint of administrative effectiveness.

Moreover, regulation of all radioactive materials under the FWPCA would involve no additional permits and no additional proceedings. As petitioners concede, every nuclear facility already must obtain a permit under the FWPCA. Reply Memorandum (on Petition for Certiorari) for Petitioners, at 1-2. At present, these permits are illogically and improperly limited to setting effluent limits under the FWPCA for thermal and non-radiological pollutants. Thus, including radioactive materials within the ambit of the FWPCA will neither increase nor decrease the number of permit applications. It will merely rationalize and centralize the authority over the discharge of radioactive materials and other pollutants into water in the EPA, as Congress intended.[36]

[36]Respondents note that the petitioners have now dropped any claim that EPA regulation would adversely affect the "energy crisis." Since the present case involves solely a question of congressional intent, such policy arguments are, in any event, more appropriately directed to Congress. In fact, however, Congress has already explicitly addressed the issue in the FWPCA and directed EPA to take energy requirements into account in setting effluent limitations. 33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B), and 1316 (b)(1)(B) (Supp. II, 1972). Moreover, as discussed in the text, regulation under the FWPCA would streamline the regulatory process, lending little support to any claim of adverse impact. Furthermore, it is strange for an industry that continues to tout itself as the coming source of "clean" energy to claim suddenly that environmental regulation equivalent to that imposed on all other energy technologies will cause it special difficulty.

B. The FWPCA Establishes An Elaborate System For Determining Appropriate Effluent Limitations Which Congress Intended Should Apply Uniformly To All Industries.

Unlike the amorphous "health and safety" standard of the Atomic Energy Act, which nowhere explicitly provides for the setting of effluent limitations, the FWPCA focuses on stimulating industry to develop and install more effective pollution control technology, and creates a rigorously detailed regulatory mechanism to achieve this goal. The FWPCA establishes a specific enforcement mechanism to ensure that water quality standards are attained. 33 U.S.C. § 1313 (Supp. II, 1972). It formulates one set of standards for existing point sources and another for new sources. 33 U.S.C. §§ 1311(a), 1316 (Supp. II, 1972). It sets out elaborate procedures and methods for determining what constitutes "the best practicable" and "the best available" technology. *Id.*

Plainly Congress intended that EPA determine effluent limitations, according to the FWPCA standards, for all industries. Moreover, Congress intended that EPA's authority under the FWPCA prevail in general over the authority of other agencies and specifically over the authority of the AEC.

> Section [1371(c)(2)] addresses itself to the authority of Federal licensing and permitting agencies, other than EPA, as relates to effluent limitations and other requirements established pursuant to the FWPCA. *EPA is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of pollutants into the waters of the United States, and*

> ***Section [1371(c)(2)] will ensure that no source of discharge which is in lawful compliance with an effluent limitation established pursuant to the FWPCA will be required to meet a different standard as a condition of a license or permit granted by another Federal agency, such as the Atomic Energy Commission.***
>
> 1 Leg. Hist. 183 (emphasis added). (Senator Muskie's prepared summary of Conference bill).

In an analogous case, the Second Circuit held that the FWPCA's comprehensive control scheme took precedence over the authority of a federal licensing agency, the Federal Power Commission (FPC). *Scenic Hudson Preservation Conference v. Callaway,* 370 F. Supp. 162 (S.D.N.Y.) (Lasker, J.), *aff'd per curiam,* 449 F.2d 127 (2d Cir. 1974). The plaintiffs in *Scenic Hudson* claimed that the Storm King hydroelectric project was required to obtain a dredge and fill permit under the FWPCA. 33 U.S.C. § 1344(a) (Supp. II, 1972). Consolidated Edison, owner of the facility, argued that the project was exempt from the FWPCA because the "Federal Power Act vests *exclusive* jurisdiction over hydroelectric plants in the FPC and denies any other Federal agency licensing power over projects within its jurisdiction." 370 F. Supp., at 165 (emphasis in original). The court stressed the all-encompassing nature of the FWPCA:

> . . . Con Ed would infer an exception from the [FWPCA] for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of

> the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands, and Congress has shown, by its recent amendments to the Alaska pipeline legislation, that it will not hesitate to remove an obstacle to energy production when it believes a change of requirements is necessary in the public interest.
>
> *Id.,* at 170.

To exempt AEA-regulated radioactive materials from EPA's cognizance would seriously breach the uniform system of regulation envisioned by the FWPCA. It would create a dual standard for release of materials into water — one for all pollutants under the FWPCA and another, unique standard for radioactive materials under the Atomic Energy Act. It is the present regulatory scheme that creates a redundant and indeed conflicting pattern of regulation.

This Court should not hesitate to give the term "radioactive materials" in the FWPCA its plain and natural meaning and to honor Congress' intent to

empower EPA to protect the "radiological integrity" of the nation's waters.[37]

[37] Despite occasional hints by petitioners to the contrary, this case does not involve any issue decided in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). The Eighth Circuit held in *Northern States Power* that the Atomic Energy Act preempted the states from regulating radioactive effluents from nuclear power plants and that holding was affirmed without opinion by this Court, two Justices dissenting. Respondents respectfully submit that *Northern States Power* has no bearing on this case or on the role the states may play in regulating, under the FWPCA, the discharge of radioactive materials into water.

In respondents' view, the discharge of radioactive materials into water is now regulated by the FWPCA, not by the Atomic Energy Act. Therefore, the question of preemption of the states' authority to set effluent limitations over the discharge of radioactive materials into water must now be viewed in the context of the FWPCA, rather than the Atomic Energy Act. In general, 33 U.S.C. § 1370 (Supp. II, 1972) of the FWPCA provides that the FWPCA does not preempt the states from enforcing more stringent effluent limitations than those set by EPA. However, a careful analysis of the FWPCA and its legislative history is necessary to determine whether Congress, under the FWPCA, intended to create an exception to Section 1370 with regard to radioactive materials and intended to preempt the states from setting more stringent standards than EPA's effluent guidelines.

But however the question of preemption is decided under the FWPCA, it has no bearing on the scope of the term "radioactive materials" and the decision whether these materials are included within the FWPCA's definition of pollutant. If the states are not preempted under the FWPCA from setting more stringent standards for the discharge of radioactive materials, the FWPCA's regulatory mechanism will operate exactly as it does now with regard to all other pollutants. If the states are preempted, then the FWPCA's regulatory mechanism will still operate with regard to radioactive materials as it does now for all other pollutants except that the states will be able to enforce only EPA-set effluent limitations and will not be able to set more stringent standards.

Respondents have not briefed the preemption question since the issue is not now before the Court. The complaint in this case seeks a declaratory judgment that all radioactive materials are regulated by the FWPCA and an order requiring EPA to exercise its authority under the Act to regulate such materials. Appendix, at 14. The states' power to set higher standards than EPA's is in no way involved. Resolution of that issue—if it arises—must appropriately await a future case posing the issue in a concrete fact situation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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